BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date: December 14, 1997
Case No: 96-INA-362

In the Matter of:

SUPER SOCKS INTERNATIONAL
Employer

On Behalf of:

BADIA IBRAHIM
Alien

Appearance: Andrew W. Ansara
for the Employer and the Alien

Before: Holmes, Huddleston and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Badia Ibrahim ("Alien") filed by Employer Super Socks International ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, Boston, Massachusetts, denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment

service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On March 8, 1995, the Employer filed an amended application for labor certification to enable the Alien to fill the position of Sales Manager in its Retail and Phone Sale company.

The duties of the job offered were described as follows:

"Retail to international clientele, specializing with Latin and Saudi Arabian customers. Telemarketing, order taking from South American customers. Requires language skills, products knowledge. Must possess Managerial Skills."

No education and 2 years experience in the job or related job of Sales promotion were required. Special requirements were: Fluent in Spanish, with knowledge of Arabic. Minimum of 2 years selling experience. Out going Personality. Experience in sales promotion. Wages were $11.30 per hour. The applicant would supervise 3 employees and report to the President. 2 applicants were referred by the State employment service.(AF-48-83)

On January 26, 1996, the CO issued a NOF denying certification. The CO alleged that employer may have violated 20 C.F.R. 656.21(b)(6) and (b)(2). The newspaper advertisement included the new requirement of hosiery knowledge which was not stated in the ETA 750. Secondly, the language requirement appeared to be a personal preference and unduly restrictive rather than a business necessity. The CO required extensive documentation by employer that the language requirement was a business necessity, including: total number of clients/people the employer deals with; special nature and percentage of business using the languages; how absence of the language would impact on the business; percentage of time a worker would use the language; previous experience with the language; how employer dealt with other ethnic groups and languages. (AF-44-47)

Employer, February 29, 1996, forwarded its rebuttal, stating in a two page letter that the store is international and includes communication in French, Italian, Dutch, German, Scandinavian languages, Russian, Vietnamese, and Chinese. 10 calls per day required Spanish and 7 per week, Arabic. Employer estimated that 20% of the time off season, and 50% in season would be needed for business necessity of the language(s). Employer has used employees from time to time who knew Spanish and Arabic but their knowledge was limited to basic translation. "In this global economy it is important to understand clients languages and

cultures in order to establish customer relationship and loyalties. As for the shift in production and pursuit of new vendors for quality and pricing, quite often it means dealing with smaller regional mills especially in Mexico. Without total command of the Spanish language, Super Socks will not be able to compete and take advantage of these market changes." Included, also, were sales slips to customers who employer alleged were from various parts of the world. (AF-10-43)

On March 29, 1996, the CO issued a Final Determination denying certification since the Employer had failed to fully document the necessity rather than preference for the language requirements. "It should be noted that the employer has not provided substantial documentation, such as letters of correspondence from clientele which require translations, telephone records or any other documentation which may have shown that the language requirements were essential (to) the employer's business. The documentation submitted, i.e sales slips of customers from "various parts of the world" (many of which are illegible) is considered insufficient to substantiate the language requirements of Arabic and Spanish... (N)o documentation was submitted clearly indicating tele-marketing to Latin or other foreign markets, i.e. telephone records or any other documentation clearly showing communication with the above-cited international markets. The employer has failed to document that the Arabic and Spanish language requirements arise from a business necessity therefore the job opportunity has not been described without unduly restrictive requirements." (AF-7-9)

On May 2, 1996 Employer filed a request for review and reconsideration of Final Determination. (AF-1-6)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993).

Section 656.21(b)(6) provides that an employer must show that U.S. applicants were rejected solely for job-related reasons. Employers are required to make a good-faith effort to recruit qualified U.S. workers for the job opportunity. H.C. LaMarche Ent.,Inc. 87-INA-607 (1988). Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. Unduly restrictive requirements are prohibited because they have a chilling effect on the number of U.S. workers who apply for or qualify for the job opportunity. The purpose is to make the job opportunity available to qualified U.S. workers. Venture International Associates, Ltd., 87-INA-569 (Jan. 13, 1989(en banc); Amimpex, Inc., 96-INA-158 (Oct. 27, 1997)

We believe the CO was correct in denying certification on the basis that employer had not directly rebutted the CO's finding that the Spanish and Arabic languages were a business necessity and not a preference. Mere recitation of a business retailers' having customers in foreign countries is not a sufficient basis for a business necessity of a foreign language. Further, even this minimal alleged justification for the language requirement was not adequately documented, since as stated by the CO in the Final Determination, the sales slips forwarded did not have addresses of the customers listed and were often illegible. We have long held that an employer must provide directly relevant and reasonably obtainable documentation sought by the CO. Gencorp, 87-INA-659 (Jan. 13, 1988)(en banc). With such vague reasons given for the business necessity which seemed aimed at furthering business rather than maintaining the current business, it becomes even more imperative that documentation requested is furnished by Employer. Employer has failed to articulate and document the business necessity of the foreign languages and declined to readvertise minus the requirements as the CO permitted in the NOF. Employer's application for certification must, therefore be denied. Edward Gerry, 93-INA-467 (June 13, 1994).

ORDER

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

_____
JOHN C. HOLMES
Administrative Law Judge

BOARD OF ALIEN LABOR CERTIFICATION APPEALS
800 K St., N.W.
WASHINGTON, D.C. 20001-8002

Date:
Case No: 95-INA-286

In the Matter of:

M.K. DESIGNERS, INC.
Employer

On Behalf of:

SETRAK MERACHIAN
Alien

Appearance: Baliozian & Associates
for the Employer and the Alien

Before: Holmes, Huddleston and Neusner
Administrative Law Judges

JOHN C. HOLMES
Administrative Law Judge

DECISION AND ORDER

This case arose from an application for labor certification on behalf of alien, Setrak Marachian ("Alien") filed by Employer M.K.Designers, Inc. ("Employer") pursuant to 212(a)(5)(A) of the Immigration and Nationality Act, as amended, 8 U.S.C. 1182(a)(5)(A)(the "Act"), and the regulations promulgated thereunder, 20 CFR Part 756. The Certifying Officer ("CO") of the U.S. Department of Labor, San Francisco, California, denied the application, and the Employer and Alien requested review pursuant to 20 CFR 656.26.

Under 212(a)(5) of the act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor may receive a visa if the Secretary of Labor ("Secretary") has determined and certified to the Secretary of State and to the Attorney General that (1) there are not sufficient workers who are able, willing, qualified and available at the time of the application and at the place where the alien is to perform such labor; and, (2) the employment of the alien will not adversely affect the wages and working conditions of the U.S. workers similarly employed.

Employers desiring to employ an alien on a permanent basis must demonstrate that the requirements of 20 CFR, Part 656 have been met. These requirements include the responsibility of the Employer to recruit U.S. workers at the prevailing wage and under prevailing working conditions through the public employment service and by other means in order to make a good faith test of U.S. worker availability.

The following decision is based on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File ("AF"), and any written arguments of the parties.

STATEMENT OF THE CASE

On April 15, 1993, the Employer filed an application for labor certification to enable the Alien, a Lebanese national, to fill the position of Wood Machinist in its cabinet and furniture manufacturing and construction company.

The duties of the job offered were described as follows:

> Responsible for set up and operation of woodworking machinery for fabrication of doors, windows, cabinets, and fine furniture. Operate power saws, drills, drill presses, sanders, tenoner, mortising machine, boring machine, router,and hand tools. Prepare parts according to specifications. Follow intricate design specifications for furniture orders.

No educational requirements and two years experience in the

job were required. Wages were $640.00 per week. (AF-25-53)

On June 22, 1994, the CO issued a NOF denying certification, finding that a U.S. applicant, Kenneth R. Pruett was unlawfully rejected. Employer alleged in his undated recruitment results report that applicant Pruett had stated the job site was too far. In a signed questionnaire from Mr. Pruett, he stated that he would not have turned down a job for $16.00 per hour, indeed, that he would have gone to Chicago or New York for that money. He further stated that he received a phone call from a woman who asked him if he could do carvings. She also asked if he could speak Farsi. The woman told him he was not qualified and hung up.(AF-21-23)

Employer, June 29, 1994, forwarded its rebuttal, stating: "As Mr. Pruett stated to you in his questioneer, Mrs. Keuroghlian asked the applicant if he had experience doing wood carving, using the specialized equipment and hand tools as was required in the job description, to construct some of the more intricate detail designs on furniture and cabinets. He responded that he was not able to do carvings. It was based upon this response that he was told that he was probably not qualified. Mr. Pruett also stated to Mrs. Keuroghlian that the job site in Glendale was too far to come for a job." (AF-9-20)

On August 23, 1994, the CO issued a Final Determination denying certification since Mr. Pruett as a master carpenter according to his resume who owned and operated a custom cabinet shop was qualified for the job opportunity. The fact that he cannot do carvings with chisels is not pertinent since the duty was not listed on the ETA 750A form. (AF-6-8)

On September 7, 1994, Employer filed a request for review and reconsideration of Final Determination. (AF-1-5)

DISCUSSION

Section 656.25(e) provides that the Employer's rebuttal evidence must rebut all the findings of the NOF, and that all findings not rebutted shall be deemed admitted. Our Lady of Guadalupe School, 88-INA-313 (1989); Belha Corp., 88-INA-24 (1989)(en banc). Failure to address a deficiency noted in the NOF supports a denial of labor certification. Reliable Mortgage Consultants, 92-INA-321 (Aug. 4, 1993).

Section 656.21(b)(6) provides that an employer must show that U.S. applicants were rejected solely for job-related reasons. Employers are required to make a good-faith effort to recruit qualified U.S. workers for the job opportunity. H.C. LaMarche Ent.,Inc. 87-INA-607 (1988). As a general matter, an employer unlawfully rejects an applicant where the applicant meets the employer's stated minimum requirements, but fails to meet requirements not stated in the application or the advertisements. Jeffrey Sandler, M.D., 89-INA-316 (Feb.11, 1991)(en banc).

We find the CO was correct in finding that the rejection of Mr. Pruett was unlawful, in that he appeared well qualified for the position and expressed an interest in accepting same. Employer's reason for rejection was that applicant was not familiar with a hand chisel, a duty that was not set out in the job requirement and would not appear to be accurate, given his long and intimate experience in the field. Where an applicant's resume shows a broad range of experience, education, and training that raises a reasonable possibility that the applicant is qualified, although the resume does not expressly state that he or she meets all the job requirements, an employer bears the burden of further investigating the applicant's credentials. Gorchev & Gorchev Design, 89-INA-118 (Nov. 29, 1990)(en banc).

ORDER

The Certifying Officer's denial of labor certification is AFFIRMED.

For the Panel:

_____
JOHN C. HOLMES
Administrative Law Judge